Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109

To: The Commission

REPLY COMMENTS OF THE BEEHIVE TELEPHONE COMPANIES

Beehive Telephone Co., Inc. and Beehive Telephone Co. Inc. Nevada (jointly "Beehive"), by their attorney, hereby submits it reply comments on the Commission's proposed rules to reduce so-called "access stimulation" as set forth in § XV.C of its Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking in the above-caption consolidate rulemaking proceeding.[1]

I. THE COMMISSION SHOULD RECONSIDER EITHER ITS TENTATIVE CONCLUSION THAT ACCESS STIMULATION RULES ARE NECESSARY OR THAT THE RULES ARE NEEDED TO CURB ARBITRAGE SCHEMES

Free Conferencing Corp. ("Free Conferencing") reported that during the last presidential election the campaigns of President Obama and Senator McCain used its service to make over

[1] *See Connect America Fund*, FCC 11-13, at 204-20 (¶¶ 635-77) (Feb. 9, 2011) ("*Notice*").

5,000,000 minutes of conferences calls.[2] We assume that the two campaigns made productive, even publicly beneficial, use of the interexchange and local exchange carrier networks that transported the calls for termination to the Free Conferencing bridges. We also assume that the conference calls did not look "free" to the two presidential campaigns, the campaign workers, or to the voters who participated in the conference calls and paid the long-distance charges that they incurred when they conferred. Considering that they generated over 5,000,000 minutes of conference calls, the two presidential campaigns can be presumed to have received the type of "rapid, efficient … communication service … at reasonable charges" that the Commission should assist in making available to the public. *See* 47 U.S.C. § 151.

Undersigned counsel can attest to the obvious fact that Free Conferencing provides a service for which there is a substantial public demand. The last three conference calls that were arranged by his clients other than Beehive used the Free Conferencing service. One of those three conference calls was arranged by a consultant with a prominent Washington, D.C. telecommunications law firm. Yet, Verizon denigrates Free Conferencing as a "renowned LEC traffic pumping partner"[3] and Sprint effectively claims that the conference calls made to President Obama's campaign in 2008, or the calls undersigned counsel placed recently, were made possible by LECs engaging in "uneconomic arbitrage to the detriment of the public interest."[4]

Sprint's claim is typical of the wholly unsubstantiated allegations of the public harm caused by access stimulation that have been bantered about by IXCs. But they cannot deny that there is a tremendous public demand for so-called "free" conferencing services made possible by

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[2] *See* Comments of Free Conferencing Corporation, WC Dkt. No. 10-90, at 6 (Apr. 1, 2011).

[3] Comments of Verizon and Verizon Wireless, WC Dkt. No. 10-90, at 43 (Apr. 1, 2011).

[4] Comments of Sprint Nextel Corporation, WC Dkt. No. 10-90, at 21 (Apr. 1, 2011) ("Sprint Comments").

access stimulation arrangements.[5] All the interstate traffic that goes to conference calling companies is generated by the customers of the IXCs that complain so loudly about "traffic pumping." It is the consumers of long-distance service who demand "access" to the conference bridges. The resulting policy issue is whether IXC customers — who pay long distance charges with the expectation that their long-distance service providers will pay the charges necessary to transmit their calls to completion — are entitled to have "access" to the call conferencing service.

The record still does not support the Commission's tentative conclusions that access stimulation has a significant impact on the industry and imposes undue costs on consumers.[6] Based on its experience with Sprint, Beehive doubts that access stimulation has had a material impact on the industry and imposed any costs at all on consumers.

During the entire time that Sprint wrongly accused Beehive of being a party to a revenue-sharing agreement, Sprint never took any steps whatsoever to terminate Beehive's access service. Instead, Sprint refused to pay Beehive's tariffed access charges, but expressed a desire to "get back on track with the access/IXC relationship" if Beehive charged a below-tariff rate or placed a "cap" on the volume of billed traffic.[7] When it was finally notified that Beehive was going terminate its access service for nonpayment, Sprint rushed into court seeking an injunction to prevent the termination,[8] thereby evidencing the fact that it was experiencing no harm from the

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[5] There was a time when the Commission equated the public demand for a telecommunications service with the public interest. *See, e.g., New York Telephone Co.*, 47 F.C.C. 2d 488, 495 (1974).

[6] *See Notice* at 205-06 (¶ 637).

[7] *See* Letter from Russell D. Lukas to Alexander Starr, File No. EB-08-MDIC-0029, Attach. 2 at 3 (Mar. 21, 2008).

[8] *See* Sprint's Application for Temporary Restraining Order and Preliminary Injunction, *Beehive Telephone Co., Inc. v. Sprint Communications Co. L.P.*, No, 2:08-cv-00380 (D. Utah Nov. 20, 2009).

access stimulation it wrongly suspected.

At the same time it withheld payment of Beehive's access charges for transporting the long-distance calls that Sprint's customers placed to the conference calling company, Sprint continued to collect the long-distance charges it billed its wireline customers who placed the calls. In addition, Sprint received revenue from its wireless subscribers whose calls to the conference calling company were transported by Beehive.[9] Thus, by not paying the intercarrier compensation due Beehive, Sprint profited handsomely from the volume of traffic it delivered to Beehive. There is no reason to believe that any actual instances of access stimulation had a less profitable impact on Sprint.

In April 2009, undersigned counsel placed a six-minute call at 11:47 PM to the conference calling company that operated in Beehive's local exchange area. He was billed $1.02 by AT&T for that six-minute call, for which AT&T incurred $0.374808 in access charges billed separately by Beehive and All American Telephone Co., Inc. at their tariffed rates. That test did not show that the operation of the conference calling company in Beehive's exchange area did not generate access charges that could have a material impact on the profitability of AT&T's long-distance service to its customers.

Finally, when it considers how access stimulation impacts the public interest, the Commission should recall that there was a time in the not too distant past when IXCs routinely engaged in access stimulation. For example, AT&T entered into an agreement in 1991, under which an information services provider would "stimulate" international traffic over AT&T's

[9] Sprint reported that it had $1.124 billion in inter-segment revenues in 2009, which consisted primarily of wireline services that were provided to its wireless business segment at market rates for resale to Sprint's wireless subscribers. *See* Sprint Nextel Corporation, SEC Form 10-K, File No. 1-04721, Notes to Consolidated Financial Statements at F-39, F-40 (Nov. 5, 2010).

lines in return for a share of the revenue AT&T received from foreign carriers for that traffic.[10] Indeed, at the same time that AT&T was excoriating Beehive for its now-terminated revenue-sharing arrangement, Beehive discovered that AT&T was engaged in the same practice on a grander scale.[11]

Beehive submits that the paucity of evidence suggesting that access stimulation has harmed the IXCs, and the lack of any evidence that it has imposed undue costs on consumers, should cause the Commission to reconsider the need to adopt access stimulation rules. If it still sees a need for regulation, the Commission should proceed with the express goal of insuring that access rates remain just and reasonable. There is no evidence to warrant a finding that access stimulation constitutes an unreasonable "arbitrage scheme."[12] Otherwise, the Commission would be proposing that the practice be declared unreasonable *per se* and not allowed pursuant to tariff.[13] Therefore, at the very least, the Commission should stress that access stimulation are not unreasonable or prohibited.

II. THE COMMISSION SHOULD REJECT THE CLAIM THAT ACCESS CHARGES CANNOT BE IMPOSED FOR TERMINATING SO-CALLED "PUMPED TRAFFIC"

The foregoing discussion was aimed at the policy implications of Sprint's contention that so-called "pumped traffic" is not "access traffic." We now turn to legal issue that Sprint implicitly presents: whether the services provided by LECs to transport and terminate interstate calls to conference calling companies constitute access service for which tariffed access rates can be charged both under the Commission's rules and the terms of their interstate access tariffs. That issue is easily resolved in the affirmative.

[10] *International Audiotext Network, Inc. v. AT&T Co.,* 62 F.3d 69, 71 (2d Cir. 1995) (*per curiam*)

[11] *See AT&T Corp. v. Beehive Telephone Co., Inc.*, 17 FCC Rcd 11641, 11656-57 (2002).

[12] *Notice* at 205 (¶ 636).

[13] *But see id.* at 213-14 (¶¶ 661-64)

The term "exchange access" is defined as "the offering of access to telephone exchange services or facilities for the purpose of the origination *or* termination of telephone toll services." 47 U.S.C. § 153(16) (emphasis added). "Access service" is defined to include "services and facilities provided for the origination *or* termination of any interstate or foreign telecommunication." 47 C.F.R. § 69.2(b) (emphasis added). A conference calling company only requires access to telephone exchange services so that long distance calls can terminate at the company's conference bridge. The Commission has determined that a LEC terminates an interstate call when it delivers the call to a conference calling company.[14] Therefore, the use of LEC services and facilities to transport an interstate call placed by an IXC customer to a local exchange for termination to a conference call company is a *terminating* access service.

The Commission also determined that terminating access charges can apply to the use of LEC services and facilities in terminating interstate calls to a conference calling company.[15] That usage constitutes chargeable "[a]ccess minutes of use" as measured from the time the call is received by the conference call company in the terminating exchange. *Id.* § 69.2(a). The second part of the issue that Sprint raised and grossly oversimplified is whether the usage also is chargeable under interstate access tariffs.

Sprint claims that federal and state regulatory bodies have concluded that "pumped traffic" to "free" conference calling companies is not access traffic, because such companies "are *not* end user customers of the terminating LEC pursuant to the LECs' tariffs."[16] With all due

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[14] *See Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Co.*, 22 FCC Rcd 17973, 17985-86 (2007), *reconsideration granted in part on other grounds in*, 23 FCC Rcd 1615 (2008), *and*, 24 FCC Rcd 14801 (2009), *and*, 25 FCC Rcd 3422 (2010), *petition for review filed, Farmers and Merchants Mutual Telephone Co. of Wayland, Ohio v. FCC,* No. 10-1093 (D.C. Cir. May 7, 2010).

[15] *See id.*

[16] Sprint Comments at 9 (emphasis in original).

respect to the Iowa Utilities Board, it is for the Commission alone to initially decide whether charges may be imposed under an interstate access tariff for terminating calls to a conference calling company. The Commission has only spoken on the issue in *Farmers*, and it did not announce some sort of rule of broad applicability.

As one court informed Sprint, the Commission's construction of the applicable tariff in *Farmers* was "fact-specific."[17] In that case, Farmers billed interstate switched access rates under the Keisling Associates LLP Tariff F.C.C. No. 1 ("Keisling Tariff"), which defined the service as allowing the customer "to terminate calls from a customer designated premises to an end user's premises."[18] Farmers transported and terminated calls to conference calling companies, which it claimed were its end-user customers.[19] Thus, the definition of the term "customer" in the Keisling Tariff proved "critical" to the Commission's decision, because under the tariff "a person or entity is not an 'end user' unless the person or entity is also a 'customer.'"[20]

Based on the "totality of the circumstances and facts," the Commission found that the conference calling companies served by Farmers were not "end users" within the meaning of the Keisling Tariff[21] and, therefore, the transport and termination of traffic to those companies did not constitute "switched access" under that particular tariff.[22] Consequently, the Commission's holding in *Farmers* will constitute controlling precedent only in cases where the facts and circumstances are the same in all material respects, and the governing access tariffs employ def

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[17] *See Splitrock Properties, Inc. v. Sprint Communications Co., L.P.*, 2010 WL 1329634, at *8 (D.S.D. Mar. 30, 2010).

[18] *Farmers*, 24 FCC Rcd 14803 & n.22.

[19] *See id*. at 14802

[20] *Id.* at 14805.

[21] *Id.* at 14813.

[22] *See id.*

for terminating calls to a conference calling company if the ined terms identical to those published in the Keisling Tariff.

The Commission has never mandated the particular terminology that must be employed in access tariffs beyond the requirement that they "contain clear and explicit statements regarding the rates and regulations." 47 C.F.R. § 61.2(a). Considering that LECs may provide different forms of access services and employ different tariff terms to describe their access services and rate classifications, the Commission's decision in *Farmers* simply cannot be conflated into a holding that the transport of traffic to conference calling companies cannot constitute switched access under any interstate access tariff.

The teaching of *Farmers* is that access charges for transporting and terminating traffic to a conference calling company can be rendered if authorized by the terms of an interstate access tariff at just and reasonable tariffed rates. The Commission should adopt that reading of *Farmers*.

Respectfully submitted,

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